



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM NATTON
ATTORNEY GENERAL**

April 19, 1990

Honorable Jim Hightower
Commissioner
Department of Agriculture
P. O. Box 12847
Austin, Texas 78711

LO-90-17

Dear Mr. Hightower:

Chapter 76 of the Agriculture Code, subchapter E, makes provisions regarding the use and application of pesticides. Section 76.102 of the subchapter provides for licensing by the Department of Agriculture of pesticide applicators in various "license use categories." Section 76.108 provides for applications to the department for "commercial applicator" licenses. Section 76.111 requires an applicant for a commercial applicator license to file "proof of financial responsibility" with the department.

As commissioner of agriculture, the officer responsible for the direction of the department, see Agric. Code § 11.001, you ask whether section 76.111 allows the commissioner to accept as proof of financial responsibility bond or insurance policies with certain exclusions or limitations.

Section 76.111 provides in relevant part:

(a) Except as otherwise provided by this section, each applicant for a commercial applicator license shall file with the regulatory agency issuing the license:

(1) a bond executed by the applicant as principal and by a corporate surety licensed to do business in Texas as surety; or

(2) a liability insurance policy, or certification of a policy, protecting

persons who may suffer damages as a result of the operations of the applicant.

(b) If an applicant cannot reasonably obtain insurance coverage or a bond as specified by Subsection (f) of this section, the regulatory agency shall accept a certificate of deposit or a letter of credit that meets the requirements of Subsection (c)(1) and rules adopted under Subsection (e) of this section.

(c) If the State Board of Insurance determines after giving notice to the regulatory agency that the liability insurance policy required by Subsection (a)(2) of this section is not generally and reasonably available to commercial pesticide applicators, then in lieu of the requirements of Subsection (a) of this section, an applicant for a commercial applicator license may:

(1) tender from a state or federal financial institution whose deposits are insured by the Federal Deposit Insurance Corporation or by the Federal Savings and Loan Insurance Corporation a certificate of deposit or letter of credit in the amount prescribed by Subsection (f) of this section, made payable to the regulatory agency and issued for the purpose of protecting persons who may suffer damages as a result of the operations of the applicant;

(2) file property damage and personal injury insurance or certification of such insurance that is generally and reasonably available as determined by the State Board of Insurance; or

(3) comply with other proof of financial responsibility requirements adopted by rule of the regulatory agency under this subchapter.

(d) The proof of financial responsibility required by this section is not required to apply to damages or injury to agricultural crops, plants, or land being worked on by the applicant.

(e) The proof of financial responsibility required by this section must be approved by the regulatory agency and conditioned on compliance with the requirements of this chapter and rules adopted under this chapter.

(f) Except as otherwise provided by this section, the amount of the proof of financial responsibility may not be less than \$100,000 for property damage and may not be less than \$100,000 for bodily injury. The head of a regulatory agency by rule may require different amounts of coverage for different classifications of operations under this chapter. At all times during the license period, the coverage must be maintained at not less than the amount set by the agency head or the State Board of Insurance, as applicable.

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(k) The regulatory agency by rule may prescribe acceptable proof of financial responsibility and appropriate procedures to carry out the purposes of this section. The regulatory agency may adopt rules governing the conditions and handling of certificates of deposit and letters of credit, but may not disburse funds or release a certificate or letter except by consent of the commercial applicator pursuant to court order. (Emphasis added.)

In 1987, section 76.111 (originally adopted in 1975 as article 135b-5a, V.T.C.S.) was substantially rewritten. Acts 1987, 70th Leg., ch. 223, § 2, at 1520. The bill analysis to said 1987 legislation noted the following with respect to the background of that act:

Under current state law, pesticide and herbicide applicators are required to carry an

insurance policy which is approved by the Texas Department of Agriculture (TDA) before licensing. The TDA has recently rejected some applicator policies as being deficient, due to a 'pollution exclusion' provision which eliminates coverages when chemical damage occurs. The TDA holds the opinion that almost any damage a pesticide or herbicide applicator might cause would be related to chemicals, and therefore these policies are inadequate to protect against liability. Others claim that these policies have had similar provisions since the early 70s and insurers have still paid claims. Often no other insurance is available to such applicators. Some feel that since insurance companies pay on these policies and that this coverage is often the only alternative to pesticide and herbicide applicators, the TDA should be required to accept such coverage as adequate.

Bill Analysis, S.B. 1216, 70th Leg. (1987).

The bill analysis to and the legislature's action in adopting the 1987 amendment of section 76.111 indicate, that the legislature recognized that the Department of Agriculture had authority to determine, within the parameters set by the provisions of the section, whether to accept bonds or liability insurance with specific exclusions from coverage. Rather than itself specifying what exclusions would be acceptable, the legislature provided that if such bond or insurance was not generally and reasonably obtainable, as determined by the State Board of Insurance, then an applicant for a commercial applicator license could, inter alia, file as proof of financial responsibility an insurance policy or certification thereof that the State Board of Insurance had determined was generally and reasonably available.¹

1. We understand from your request letter that the State Board of Insurance has not made the determination pursuant to subsection (c) that the insurance required by subsection (a)(2) is not generally and reasonably available.

(Footnote Continued)

We think that a determination of what exclusions from coverage would be acceptable in bonds or insurance policies executed for the purpose of "protecting persons who may suffer damages as a result of the operations of the [commercial applicator license] applicant" under section 76.111 would require consideration of factual information as to the circumstances under which persons have suffered or are likely to suffer damages as a result of an applicator's operations. The department as regulatory agency for such operations is in a position to obtain and evaluate such factual information. We cannot make such determinations in the opinion process.

We note additionally that where the department determines that it will accept under section 76.111 bonds or policies with exclusionary provisions that might potentially diminish the protection of persons or property that it was the purpose of the section to provide for, the department may offset such potentialities by imposition of additional restrictions on applicators pursuant to its broad rule making power under section 76.104. Subsection (b) of section 76.104 authorizes the department to adopt rules that may:


- (1) prescribe methods to be used in the application of a restricted-use or state-limited-use pesticide;
- (2) relate to the time, place, manner, method, amount, or concentration of pesticide application or to the materials used in pesticide application; and
- (3) restrict or prohibit use of a restricted-use or state-limited-use pesticide in designated areas during specific periods of time.

(Footnote Continued)

We assume therefore that the provisions of subsection (c), that the section's requirement of proof of financial responsibility may be met by an insurance policy determined by the State Board of Insurance to be generally and reasonably available, have not been triggered.

See Helle v. Hightower, 735 S.W.2d 650 (Tex. App. - Austin 1987, writ denied) (department has broad authority over pesticide application, particularly under subsection (b)(2) of section 76.104). For example, in its current administrative rules the department has provided "If a bond or liability insurance policy specifically excludes a particular chemical from coverage, the applicator is not licensed to apply that chemical." 4 T.A.C. § 7.14(a)(3).

Very truly yours,



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